

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

FILED
United States Court of Appeals
Tenth Circuit

September 15, 2017

Elisabeth A. Shumaker
Clerk of Court

WALTER PAYTON,

Plaintiff - Appellant,

v.

STATE OF KANSAS; 18TH JUDICIAL
DISTRICT COURT; JAMES
FLEETWOOD, Chief Judge; MARK
BENNETT, Chief District Attorney,

Defendants - Appellees.

No. 17-3107
(D.C. No. 5:17-CV-03049-SAC-DJW)
(D. Kan.)

ORDER AND JUDGMENT*

Before **BRISCOE, O'BRIEN**, and **BACHARACH**, Circuit Judges.

This appeal involves constitutional claims growing out of the Kansas courts' application of a Kansas law (Kan. Stat. Ann. § 21-2512) to Mr. Payton. Under this law, individuals convicted of rape can petition for new DNA testing of biological material.

* We conclude that oral argument would not materially help us to decide this appeal. As a result, we are deciding the appeal based on the briefs. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G).

This order and judgment does not constitute binding precedent except under the doctrines of law of the case, *res judicata*, and collateral estoppel. But the order and judgment may be cited for its persuasive value under Fed. R. App. P. 32.1(a) and 10th Cir. R. 32.1(A).

Mr. Payton filed a petition under this law;¹ but the Kansas Court of Appeals affirmed, and the Kansas Supreme Court denied review. These decisions led Mr. Payton to file a federal habeas petition, but the federal courts declined to order habeas relief.

So, Mr. Payton invoked 42 U.S.C. § 1983, suing a Kansas judge and prosecutor for violating the U.S. Constitution by misapplying § 21-2512. The federal district court dismissed the constitutional claims for failure to state a valid cause of action. We agree with this ruling.²

Mr. Payton's constitutional claims stem from a misunderstanding about the Kansas law. This law would authorize DNA testing only if Mr. Payton's biological material "was not previously subjected to DNA testing" or could be retested with new DNA techniques likely to be more accurate and probative. Kan. Stat. Ann. § 21-2512(a)(3). If the new DNA tests were to favor Mr. Payton in a way that is material to the conviction, the Kansas district court would need to conduct a hearing. At that point, § 21-2512(f)(2) would allow the Kansas district court to grant relief such

¹ See *State v. Payton*, No. 99,293, 198 P.3d 212, 2009 WL 77911, at *1 (Kan. Ct. App. Jan. 9, 2009) (per curiam) (unpublished).

² In federal district court, a magistrate judge proposed to treat Mr. Payton's § 1983 action as another habeas action. In response, Mr. Payton appeared to question that treatment, pointing out that he had sued under § 1983 rather than file another habeas petition. The district judge observed that it would have lacked jurisdiction to grant habeas relief. In the appeal, Mr. Payton has not questioned the district judge's conclusion regarding a potential habeas claim.

as vacating the conviction, deeming the sentence discharged, ordering a new sentencing proceeding, granting a new trial, or granting other relief that serves the interests of justice. Kan. Stat. Ann. § 21-2512(f)(2).

Mr. Payton appears to misunderstand the Kansas law, for

- it would not apply under his version of the facts and
- even if the law were applicable, favorable DNA results would not necessarily require relief from the rape conviction or sentence.

Mr. Payton states that before his trial, DNA tests showed that he had not committed rape. But Mr. Payton says that the state judge and prosecutor explained the results away with false testimony that the rapist had used a condom.

In this appeal, Mr. Payton clarifies that he does not want new DNA tests. Appellant's Br. at 2 ("Payton is not seeking DNA testing just wants DNA testing already performed to apply KSA 21-2512."). Why should he want further testing? After all, he insists that the prior DNA tests have already shown his innocence.

But the Kansas law's remedies apply only if a petitioner obtains new DNA tests for biological material that was previously untested or that is later subject to better forms of testing. *See State v. Lackey*, 286 P.3d 859, 864 (Kan. 2012) ("K.S.A. 21-2512 contemplates the necessity for new or different DNA testing, not the further analysis of previous test results."). Without new DNA tests, the law's remedies would not be triggered. Thus,

§ 21-2512 would not apply even if the Kansas district court had credited Mr. Payton's allegations.

But even if § 21-2512 had been triggered, it would not have required the Kansas courts to disturb the conviction or sentence. Mr. Payton contends that on a favorable DNA test, the Kansas district court must order one of the remedies listed in § 21-2512(f)(2). But Kansas's Supreme Court has squarely rejected this interpretation, holding that favorable DNA results do not necessarily entitle a petitioner to any of the remedies in § 21-2512(f)(2). *Haddock v. State*, 286 P.3d 837, 848-49 (Kan. 2012). Thus, Mr. Payton's theory rests on a misinterpretation of the Kansas law.

* * *

In our view, Mr. Payton's constitutional claims are based on a misunderstanding of the Kansas law. It would not apply here, where Mr. Payton has expressly disavowed the need for further DNA testing. And even if the law had been triggered, it would not necessarily have required the Kansas courts to order one of the remedies listed in § 21-2512(f)(2). Thus, we affirm the dismissal.

Entered for the Court

Robert E. Bacharach
Circuit Judge

FILED

**United States Court of Appeals
Tenth Circuit**

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

October 13, 2017

**Elisabeth A. Shumaker
Clerk of Court**

WALTER PAYTON,

Plaintiff - Appellant,

v.

No. 17-3107

STATE OF KANSAS; 18TH JUDICIAL
DISTRICT COURT; JAMES
FLEETWOOD, Chief Judge; MARK
BENNETT, Chief District Attorney,

Defendants - Appellees.

ORDER

Before **BRISCOE, O'BRIEN**, and **BACHARACH**, Circuit Judges.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court



ELISABETH A. SHUMAKER, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

WALTER PAYTON,

Plaintiff,

v.

CASE NO. 17-3049-SAC-DJW

STATE OF KANSAS,

Defendant.

MEMORANDUM AND ORDER

This matter is a civil action filed by a prisoner in state custody. Plaintiff names as defendants the State of Kansas, the 18th Judicial District Court, the Chief Judge of that district, and the Chief District Attorney.

The complaint alleges that the state district judge refused to compel DNA testing, which plaintiff sought under K.S.A. 21-2512.¹ As relief, plaintiff asks this court to set aside the judgment, discharge him from his present custody, resentence him, grant a new trial, and grant immediate relief (Doc. #1, p. 5).

The matter was referred to U.S. Magistrate Judge Waxse for initial screening under 28 U.S.C. § 636. Judge Waxse entered an order liberally construing this matter as a petition for habeas corpus because plaintiff seeks relief from his conviction and custody. Because plaintiff has sought relief in earlier applications for habeas corpus, Judge Waxse's order directed plaintiff to show cause why this

¹ K.S.A. 21-2512 *Forensic DNA testing; limits thereof* allows persons in state custody after conviction for murder or rape to petition the trial court for forensic DNA testing of material in the actual or constructive possession of the state that was not earlier tested or that can be more accurately tested with new techniques. Under K.S.A. 21-2512(c), the trial court shall order the testing "upon a determination that testing may produce noncumulative exculpatory evidence relevant to the claim of the petitioner that the petitioner was wrongfully convicted or sentenced."

matter should not be dismissed due to his failure to seek prior authorization from the U.S. Court of Appeals for the Tenth Circuit. See 28 U.S.C. § 2244(b) (governing second or successive petitions and requiring prior authorization from the appropriate federal court of appeals).

Plaintiff has filed a timely response (Doc. #5). He argues that his action should proceed under § 1983, and he now appears to allege a violation of equal protection. Plaintiff's bare allegation of equal protection appears to rest on the denial of DNA testing in his criminal case, while that testing has been allowed in other, unrelated cases.

The Court rejects plaintiff's claim. It is settled that the federal courts have no supervisory jurisdiction over state courts and do not direct the courts or their officers in the performance of their duties. *Van Sickle v. Holloway*, 791 F.2d 1431, 1436 n. 5 (10th Cir. 1986).

While he may appeal, and has appealed, an unfavorable decision in the trial court to the Kansas appellate courts, plaintiff may not challenge the decision of a state judge in an action under Section 1983. Judicial immunity shields a judge not only from damages in a civil action also from the suit itself. *Mireles v. Waco*, 502 U.S. 9, 11 (1991). There are only two exceptions to this rule; first, there is no judicial immunity "for actions not taken in the judge's judicial capacity", and second, there is no immunity for judicial actions taken "in the complete absence of all jurisdiction." *Mireles*, 502 U.S. at 11-12. Neither exception applies here.

Regarding the construction of this matter as an unauthorized, successive application for habeas corpus, the court notes that plaintiff has sought relief concerning DNA testing in the state courts

on multiple occasions.

The Kansas Court of Appeals has summarized his efforts as follows:

The ... issue regarding retesting of his DNA was raised by Payton in pro se motions he filed during 2006 in 97 CR 12038 and 97 CR 1537. The district court denied the motions, and the files and records of our court show that Payton appealed the adverse decisions in *State v. Payton*, case No. 96,637. Payton moved for summary disposition pursuant to Supreme Court Rule 7.041 (2008 Kan. Ct. R. Annot. 55), and the State filed a response. Our court summarily affirmed on November 9, 2006: "Where there is no possibility that DNA testing could assist in exculpating the defendant, no additional DNA testing is required by K.S.A. 2005 Supp. 21-2512(c). [Citation omitted.]" Payton's petition for review by the Kansas Supreme Court was denied on February 14, 2007.

This ... issue ... has been fully litigated. Accordingly, we decline to reconsider it.

State v. Payton, 198 P.3d 212 (Table), *1 (Kan. Ct. App. Jan. 9, 2009).

Judge Waxse's order notes that plaintiff has filed at least three earlier federal petitions for habeas corpus relief, and this court agrees that it is reasonable to dismiss this matter without prejudice. Plaintiff has been made aware of the need for prior authorization to file a successive application for habeas corpus and, until he obtains that authorization, this court lacks jurisdiction to consider his claims concerning his custody in a habeas corpus action.

Conclusion

For the reasons set forth, the court concludes this matter must be dismissed. Plaintiff's challenge to the state district court's denial of DNA testing does not state a claim for relief under Section 1983, and he has not obtained prior authorization to proceed in a

successive federal habeas corpus action.

IT IS, THEREFORE, BY THE COURT ORDERED this matter is dismissed without prejudice to petitioner's pursuit of habeas corpus relief upon prior authorization to proceed in a successive application.

IT IS FURTHER ORDERED plaintiff's motion to proceed in forma pauperis (Doc. #2) is granted.²

IT IS FURTHER ORDERED plaintiff's motion for relief (Doc. #3) is denied.

IT IS SO ORDERED.

DATED: This 21st day of April, 2017, at Topeka, Kansas.

S/ Sam A. Crow
SAM A. CROW
U.S. Senior District Judge

² The court adopts Magistrate Judge Waxse's construction of this matter as a successive application for habeas corpus and therefore does not order collection action.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

WALTER PAYTON,

Plaintiff,

v.

CASE NO. 17-3049-SAC-DJW

STATE OF KANSAS, et al.,

Defendants.

MEMORANDUM AND ORDER

Plaintiff, a prisoner in state custody, commenced this matter as a civil rights action filed under 42 U.S.C. § 1983. Because plaintiff challenges the state district court's denial of DNA testing under K.S.A. 21-2512 and alleges his conviction is unlawful, the Court liberally construed the action as a petition for habeas corpus and concluded it was a successive application for relief. Due to petitioner's failure to seek prior authorization to proceed in a successive application, the Court dismissed the matter for lack of jurisdiction.

Petitioner has filed a Notice of Appeal (Doc. #8). The Court has considered the record and grants petitioner leave to proceed on appeal in forma pauperis.

IT IS THEREFORE, BY THE COURT ORDERED petitioner is granted leave to proceed on appeal in forma pauperis.

IT IS SO ORDERED.

DATED: This 9th day of May, 2017, at Topeka, Kansas.

S/ Sam A. Crow
SAM A. CROW
U.S. Senior District Judge

62 P.3d 1112 (2003 App. 2003)

COPY

FILED
APP DOCKET NO. _____

IN THE EIGHTEENTH JUDICIAL DISTRICT
DISTRICT COURT, SEDGWICK COUNTY, KANSAS
CIVIL DIVISION

2017 FEB 24 A 8:20

CLERK OF DIST COURT
18TH JUDICIAL DISTRICT
SEDGWICK COUNTY, KS

BY _____

WALTER PAYTON,

Plaintiff,

vs.

STATE OF KANSAS,

Respondent.

Case No. 17CV287
17CV288

res judicata

81,569

ORDER

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chron

In 17CV287, petitioner filed a "Motion of AFFIDAVIT of FACT Manifest In Justice Pursuant to K.S.A. 60-1507 K.S.A. 21-2512(g) that contains a litany of alleged trial errors, requests a hearing pursuant to K.S.A. 21-2512(g), and a "full evidentiary hearing on the Affidavit of Fact 60-1507/21-2512(g)." In 17CV288, petitioner filed a "Motion Manifest Injustice K.S.A. 21-2512(f)(2)(A)(B)(g) Habeas corpus other writs claiming that "DNA IS FAVORABLE" and requesting a "hearing pursuant to 21-2512(f)(2)."

In 1998, petitioner was convicted of three counts of rape and sentenced to a controlling term of 712 months. The Court of Appeals rejected the issues, including an ineffective assistance of counsel claim, raised by petitioner in his direct appeal and his convictions were affirmed. See State v. Payton, No. 81,569, unpublished opinion filed February 18, 2000.

Petitioner filed a motion pursuant to K.S.A. 60-1507 in 2001. Petitioner claimed ineffective assistance of counsel for several reasons. The motion was summarily denied by the district court and the Court of Appeals rejected petitioner's appeal. See Payton v. State, No. 88,293, unpublished opinion filed January 24, 2003. The Kansas Supreme Court denied petitioner's petition for review. 275 Kan. 965 (2003).

In 2006, petitioner filed a motion for retesting of DNA evidence. The motion was denied by the district court because DNA testing had been performed. The Court of Appeals denied petitioner's appeal holding that DNA testing had been performed and the DNA testing excluded petitioner as a contributor to the DNA found at the scene. The Court found that the jury heard the evidence and was properly instructed. The Court concluded that there was no possibility that additional DNA testing could assist in exculpating petitioner or provide any other benefit to him. See Payton v. State, No. 96,637, summary order filed November 9, 2006. The Kansas Supreme Court denied petitioner's petition for review on February 14, 2007.

Petitioner filed a "Motion for Actual Innocent Pursuant to K.S.A. 21-2512 DNA excluded" in 2007. Petitioner made several allegations in the motion including that DNA evidence excluded him from the crimes. The motion was denied by the district court. On

**UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT
OFFICE OF THE CLERK**

Byron White United States Courthouse
1823 Stout Street
Denver, Colorado 80257
(303) 844-3157

Elisabeth A. Shumaker
Clerk of Court

October 23, 2017

Chris Wolpert
Chief Deputy Clerk

Mr. Timothy M. O'Brien (KStp)
United States District Court for the District of Kansas
Office of the Clerk
444 Southeast Quincy
Room 490
Topeka, KS 66683-0000

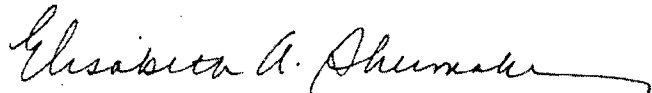
RE: 17-3107, Payton v. State of Kansas, et al
Dist/Ag docket: 5:17-CV-03049-SAC-DJW

Dear Clerk:

Please be advised that the mandate for this case has issued today. Please file accordingly in the records of your court or agency.

Please contact this office if you have questions.

Sincerely,



Elisabeth A. Shumaker
Clerk of the Court

cc: Walter Almon Payton

EAS/mlb